

Parr Lance Ambulance Service and Timothy Smith.
Case 25-CA-13418

July 26, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND
MEMBERS FANNING AND HUNTER

On February 11, 1982, Administrative Law Judge Wallace H. Nations issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.²

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Parr Lance Ambulance Service, Indianapolis, Indiana, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

¹ The Administrative Law Judge found that ambulance driver Smith and Emergency Medical Technician (EMT) Stewart were engaged in protected concerted activity when they refused to operate an inadequately equipped ambulance. In agreeing with the Administrative Law Judge's finding, we note that the Indiana regulations governing the certification of EMTs (836 IAC 1-5-1(d)(2) (1978)) provide that an EMT's certification may be revoked for "failure to perform or failure to perform competently an indicated procedure for which training has been received in the basic emergency medical technician training course" Therefore, an EMT has a legitimate concern in having available all equipment necessary to perform an indicated procedure for which he or she has been trained. In addition, the record contains uncontradicted testimony that part of the ambulance driver's duties include assisting the EMT in utilizing emergency equipment. Accordingly, and for the additional reasons given by the Administrative Law Judge, we find that the adequacy of an ambulance's emergency equipment constitutes a working condition for both the EMT and the ambulance driver. Further, since we agree with the Administrative Law Judge's finding that both Smith and Stewart refused to operate the ambulance, we find it unnecessary to reach the Administrative Law Judge's discussion of whether such a refusal would have constituted concerted activity if it had been engaged in by only one employee.

² We find that it will effectuate the purposes of the Act to require Respondent to expunge from its personnel files, or other records, any reference to the discharge of Timothy Smith on April 4, 1981, and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.

1. Insert the following as paragraph 2(b), and re-letter the subsequent paragraphs accordingly:

"(b) Expunge from its personnel files, or other records, any reference to the discharge of Timothy Smith on April 4, 1981, and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him."

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

The National Labor Relations Act, as amended, gives you, as employees certain rights, including the rights:

- To engage in self-organization
- To form, join, or help a union
- To bargain collectively through a representative of your own choosing
- To act together for collective bargaining or other mutual aid or protection
- To refrain from any or all of these things.

Accordingly, we give you these assurances:

WE WILL NOT discharge or otherwise discriminate against our employees in regard to their hire, tenure, or any term or condition of employment because they engage in concerted activities protected by Section 7 of the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL offer Timothy Smith immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and **WE WILL** make him whole for any losses suffered by reason of our unlawful conduct, with interest.

WE WILL expunge from our personnel files, or other records, any reference to the discharge of Timothy Smith on April 4, 1981, and notify him in writing that this has been done and that evidence of this unlawful discharge will not be used as a basis for future personnel actions against him.

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PARR LANCE AMBULANCE SERVICE

DECISION

STATEMENT OF THE CASE

WALLACE H. NATIONS, Administrative Law Judge: Upon a charge filed by Timothy Smith, on April 10, 1981, a complaint issued on May 22, 1981, alleging that Parr Lance Ambulance Service (herein called Respondent), has violated the Act by discharging Smith for engaging in protected activity. A hearing was held in Indianapolis, Indiana, on November 19 and December 10, 1981. Although Respondent initially contested the Board's jurisdiction in this proceeding, it stipulated to jurisdiction at the December 10, 1981, hearing. Briefs were filed by General Counsel and Respondent.

Upon the entire record in this case, and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS AND CONCLUSIONS

I. THE BUSINESS OF RESPONDENT

Respondent is engaged in the business of providing and performing ambulance services with its principal place of business in Indianapolis, Indiana. As noted, Respondent has formally stipulated that it is an employer within the meaning of the Act and that it is engaged in the requisite amount of interstate commerce.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts Relating to Smith's Alleged Discharge*

In Respondent's ambulance division, there are approximately 28 employees who work on three shifts covering a 24-hour period. Assigned to each emergency vehicle is one driver and one emergency medical technician (EMT). Both Respondent, as an ambulance provider, and EMT's assigned to its registered ambulances, must be certified by the State of Indiana's Emergency Medical Services Commission (EMSC). State law requires no special certification of ambulance drivers by the EMSC.

Lloyd Shonkwiler is president of Respondent and Michael Shonkwiler has been its manager since January 1, 1981. Bobby Lee Jones is the supervisor of Respondent's ambulance division having taken that position on January 1, 1981.

As pertinent, in early 1981, the Charging Party, Timothy Smith, was employed as an ambulance driver by the Respondent. In March 1981, Smith and an EMT employed by Respondent, Tine Martin, had a meeting with M. Shonkwiler and Jones. The meeting was called primarily to discuss the possible discipline of Smith over a dispute he had with a company dispatcher. During the course of this meeting, both Smith and Martin complained that certain safety equipment required by state law to be carried on the Company's ambulances were missing. During this meeting, either Jones or Shonkwiler

informed Smith and Martin that they were the only employees who complained about the missing equipment.

On April 4, 1981, Smith reported to work as a driver and assisted a new EMT, Nancy Stewart, in checking their assigned ambulance for equipment that was required to be carried on the ambulance. Stewart testified that she was a new employee and not as familiar as Smith with respect to what equipment was required. With Stewart's help, Smith prepared a list of equipment that was missing and presented it to the dispatcher, informing the dispatcher that he would not take out the ambulance with equipment missing. Smith was unsuccessful in obtaining permission of the dispatcher to use another ambulance and the dispatcher agreed to call Supervisor Jones for discussion of the problem. Smith and Stewart then accepted a dispatch for a nonemergency run. After completion of this run, they were dispatched on another run involving the transport of a dead body. After completion of this run, they were assigned a third run where they were within a few blocks of the Company's headquarters.

Smith then advised the dispatcher that he was refusing the run and returning to headquarters. Upon Smith's arrival at headquarters he was informed by the dispatcher that Jones had been there to meet with him but had left. M. Shonkwiler came to the dispatch office and inquired whether Smith and Stewart were refusing to take the ambulance out because of the equipment missing. Both Smith and Stewart said that this was the case. Stewart testified that she told Shonkwiler that she agreed with Smith. Shonkwiler then informed both employees that if they felt that way they should clock out. Shonkwiler then returned to his office. Smith, at this point, clocked out and left. Stewart stayed on the premises as the job she held with Respondent was her first job and she was worried about losing it.

After a short passage of time, Stewart told the dispatcher on duty that she did not want to clock out as she was afraid of losing her job and what her family would say. The dispatcher informed Stewart that she would find Stewart a new partner and dispatch her on more runs that day.

Later that day, Smith and Martin went to the offices of the EMSC and complained to its director about the equipment missing from Respondent's ambulances. Another employee of Respondent, Dee Dee Bowman, was at the EMSC office to secure her certification as an EMT. She was asked by the director about the missing equipment and acknowledged that equipment was missing from Respondent's ambulances.

The following day Smith and Stewart arrived at the Respondent's premises separately around 6 a.m. for work. Smith requested from the dispatcher his timecard and was told that he had been taken off the schedule by Shonkwiler. Stewart was given a timecard and worked that day.

B. *Analysis and Conclusions*

To this point, there is no significant credibility issue in this case. Thereafter, the testimony of various witnesses diverges greatly over subsequent events and conversa-

tions. The subject matter of this divergent testimony is whether Smith was actually discharged or whether he voluntarily quit his employment. Respondent has chosen on brief not to urge its position taken at the hearing that Smith quit and was not terminated. I do not believe it is necessary to determine what testimony is credible with respect to this issue. All undisputed facts point to the conclusion that Smith was discharged by Respondent. From the time Smith clocked out on April 4, 1981, he was never thereafter allowed to work for Respondent. His action in reporting for work on the following day is wholly inconsistent with any theory that he voluntarily resigned from the Company. Sometime later, Smith filed for unemployment compensation benefits and Respondent, in response to Smith's filing, did not take the position that he had voluntarily left employment. Because Smith was refused work on April 5, 1981, as well as on days subsequent, and because of the position taken by Respondent with respect to the unemployment compensation filing, I find that Smith was discharged and the discharge was effective from the time M. Shonkwiler told Stewart and Smith to clock out on April 4, 1981. The testimony of Stewart makes clear that she believed that had she followed Smith in leaving Respondent's office, she would have been discharged.

The General Counsel urges that the effective date of Smith's termination was April 5, 1981, the time in which Smith was refused his timecard. In urging that this was the point in time when Smith was discharged, the General Counsel contends that Smith's visit to the EMSC on the afternoon of April 4, 1981, also formed part of the basis for Respondent's decision to discharge him. I cannot find that this visit did, in fact, enter into Respondent's decision. There is no proof that Respondent had knowledge of the visit until some time after Sunday morning, April 5, 1981. When departing Respondent's premises on April 4, 1981, Smith commented to Stewart that he was going to complain to a local TV station and visit the EMSC in furtherance of his protest over the missing equipment. There is a possibility that this comment was overheard by one of Respondent's dispatchers, but there is no clear proof that this was the case. Based on all the facts of record, I find that the decision to discharge Smith was predicated on his refusal to take another run in the ambulance to which he was assigned on April 4, 1981.

Having determined that the effective date of discharge of Smith was April 4, 1981, the following legal issues are presented for determination. First, was the activity engaged in by Smith and Stewart of a concerted nature? Second, if so, was such activity protected under the Act? If protected, when engaged in by both Smith and Stewart, did it subsequently lose its protection by Stewart's change of mind and return to work? Ultimately, I find that each of these issues must be resolved in favor of the General Counsel.

At the time of the confrontation with M. Shonkwiler on April 4, 1981, there is no doubt that Stewart and Smith were jointly presenting a complaint about equipment missing on the ambulance to which they were assigned. That their concern was shared by other employees is reflected by Martin's earlier complaint with Smith

about the same subject and by Martin's visit with Smith to the EMSC to formally complain about the missing equipment to that state agency. The testimony of EMT Bowman indicates that, though she was not taking any direct action about the situation, she, too, was concerned about the equipment missing from Respondent's ambulances. Therefore, as Smith and Stewart, on April 4, 1981, were acting in concert and were expressing a concern that was shared by other similarly situated employees, I find that at its inception the action taken was definitely concerted activity within the meaning of the Act.

To determine whether or not this activity was protected, it must be determined whether it relates to the employees' working conditions. As shown by the evidence, the primary motive for making the complaint about the missing equipment was the team's ability to provide patient care. On brief, Respondent asserts that because of Smith's history of tardiness and by the act of refusing to take a run, Smith did not possess a genuine concern about the care of the patients carried in his ambulance. I disagree. Smith's testimony at the hearing about his concern for patients, his history of employment in the emergency care field, and his concern over equipment missing from Respondent's ambulances are only consistent with a desire to provide adequate patient care. A closer question is whether concern over the quality of patient care in and of itself can form the basis for protected activity. In *Reading Hospital and Medical Center*, 226 NLRB 611 (1976), *enfd.* 562 F.2d 42 (3d Cir. 1977), the Board held protected a threat by an operating room nurse to complain to a newspaper that the proposed elimination of a surgical residency might require performance of surgical duties beyond her competence. Citing *Reading*, with approval, the Second Circuit Court of Appeals in *Misericordia Hospital Medical Center v. N.L.R.B.*, 623 F.2d 808 (1980), stated, "The record supports the Board's finding that the report raised issues that related not only to patient welfare but the working conditions of the employees; indeed, in the health care field such issues often appear to be inextricably entwined." In the case under review, the Board held a report prepared by hospital employees cataloging alleged inadequacies in the operation of the hospital to be protected. Although the Board found that the report had a relationship to the working conditions of the employees in the hospital, the thrust of the report was almost entirely to complain about hospital conditions which affected patient care. Complaints in the report about sanitary conditions at the hospital were interpreted by the Board to be similar to complaints about safety conditions in the working place and complaints about staff shortages directly related to employee working conditions.

In the instant case, there is a relationship between the complaint involved and the working conditions of the Respondent's employees at least as strong as that found in *Reading, supra*. The director of the EMSC testified that his agency had the authority to conduct hearings and attempt to revoke licenses issued both to ambulance providers and individual emergency EMTs. Thus, the legal possibility exists that Stewart and other EMTs employed by Respondent could be subject to a license revo-

cation proceeding for operating ambulances not in conformance with state equipment requirements. Though Smith, as driver of the ambulance, is not subject to this risk, it is possible that both he and the EMT could be the subject of a law suit if they, acting as a team, failed to provide adequate emergency medical care to a patient because they lacked the state required equipment to do so.

In *Bronco Wine Company*, 256 NLRB 13 (1981), the Board found protected a maintenance man's expressed concern over the failure of management to provide parts and supplies to properly perform his duties. Certainly, concern over receiving parts and supplies by a maintenance man has no more connection with his working conditions than does the expressed concern over missing required medical equipment from an ambulance operating under the supervision of an EMT licensed by the State to provide a given level of emergency medical care. The lack of parts and supplies obviously makes it difficult for a maintenance person to perform his duties just as lack of emergency medical equipment makes it difficult to provide adequate emergency care. Respondent urges that because it is not Indianapolis' primary emergency care ambulance provider and because the bulk of its runs involve nonemergency situations, the concern of Smith and Stewart over missing equipment is unreasonable as such equipment is rarely actually needed. This position seems valid only if the Company were never called on to provide emergency ambulance service, which is not the case. Accordingly, for the reasons set forth above, I find the concerted action taken by Smith and Stewart on April 4, 1981, was protected by the Act.

I cannot find that Smith lost the Act's protection because some time after he had walked off the job in protest over the missing equipment Stewart had a change of mind and returned to work. The walkout was definitely concerted at the time the complaint was made to M. Shonkwiler on April 4, 1981, and the parties were still acting in concert at the time Smith was told to clock out, leave, and did so. Stewart's fear over losing her job and subsequent request to return to work on that date cannot alter the fact of what had already happened. Moreover, the Board has held that walkouts by single employees can constitute protected concerted activity. *Steere-Diary, Inc.*, 237 NLRB 219 (1978). Also, the Board has held that individual action can be considered concerted where the activity relates to conditions of employment that are matters of mutual concern to all affected employees. *Air Surrey Corporation*, 229 NLRB 1064 (1977). As noted above, several of Respondent's employees shared concern over medical equipment missing from the Company's ambulances. Thus, for the reasons stated, and relying on the cases cited, I find that Smith's activity was protected at the time it was taken and that it did not lose its protection by virtue of Stewart's return to work.

No reason other than Smith's refusal to operate the ambulance to which he was assigned on April 4, 1981, has been advanced by Respondent for his termination. Thus, it is clear that his protected actions on April 4, 1981, did constitute the reason for his termination. Having found that such activity constituted concerted

protected activity within the meaning of the Act, I find that Respondent has engaged in, and is engaging in, unfair labor practices in violation of Section 8(a)(1) of the Act.

III. THE REMEDY

It having been found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, it will be recommended that Respondent be required to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

It also having been found that Respondent discharged Timothy Smith for engaging in concerted protected activities, Respondent shall be required to offer him immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and shall make him whole for any loss he may have suffered by reason of the discrimination against him. All backpay due under the terms of this Order shall be computed, with interest, in the manner described in *F. W. Woolworth Company*, 90 NLRB 289 (1960), and *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

On the basis of the above findings of fact and the entire record in this case, I make the following:

CONCLUSIONS OF LAW

1. Parr Lance Ambulance Service is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By discharging Timothy Smith because of his protected concerted activities, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(1) and 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹

The Respondent, Parr Lance Ambulance Service, Indianapolis, Indiana, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging its employees because they engage in activities protected by Section 7 of the National Labor Relations Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed to them in Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

¹ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(a) Offer Timothy Smith immediate and full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or other rights and privileges, and to make him whole for any loss he may have suffered by reason of the unlawful conduct involved herein, in the manner set forth in the section of this decision entitled "The Remedy."

(b) Post at its place of business in Indianapolis, Indiana, copies of the attached notice marked, "Appendix."²

² In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Copies of said notice, on forms provided by the Regional Director for Region 25, after having been duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Preserve and, upon request, make available to the Board or its agents all records necessary to analyze the amount due in the effectuation of this remedial Order.

(d) Notify the Regional Director for Region 25, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.